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No. 01-183

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT LOUIS STEVENSON,

Petitioner,

v.

DISTRICT OF COLUMBIA
METROPOLITAN POLICE DEPARTMENT, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether in this action under 42 U.S.C. § 1983 against police officers, where petitioner placed in issue his own motive for flight to evade arrest through his own testimony and his counsel's opening statement to the jury, the District Court abused its discretion in receiving physical evidence offered by the arresting officers that contradicted petitioner's testimony and counsel's statement of his motive.

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, is reported at 248 F. 3d 1187.

COUNTER-STATEMENT OF THE CASE

A. The Proceedings.

This action was filed by petitioner Robert Louis Stevenson against the District of Columbia Metropolitan Police Department (MPD) and five police officers, under 42 U.S.C. § 1983, alleging excessive force in violation of the Fourth Amendment in arresting him and stopping his flight to evade arrest. The case was tried to a jury over an eight-day period, and the jury returned verdicts in favor of the the police officers on all of Stevenson's claims. (J.A. 439-41). Stevenson challenges an evidentiary ruling that admitted a gun into evidence.

B. Background Facts.

On March 7, 1996, MPD Officer Demetrius Cole was working off-duty, but in uniform, providing security at a McDonald's restaurant in Washington, D.C. (J.A. 301). At about 9:00 p.m., Stevenson drove a 1988 Chrysler with Maryland tags into the parking lot and entered the drive-through lane; Larry J. Wallace was the passenger in the car. (J.A. 202, 302). The car had a broken rear window, which made Officer Cole suspect that it had been stolen. (J.A. 302). Cole confirmed in a telephone call to the MPD that the car had been stolen; he requested police assistance. (J.A. 302-04).

Two MPD cars, each with two officers, responded to the restaurant. Cole and two other officers approached the Chrysler from the front and blocked its path with guns drawn. (J.A. 302-04, 307, 318-19, 333-34). Two others approached from the rear. (J.A. 322-34). The officers surrounded the car and ordered Stevenson to put the car in park and to show his hands. (J.A. 308-10, 323-24). Instead of doing that, Stevenson attempted escape by driving the car away. (J.A. 310-11). What happened next is disputed.

According to the officers, Stevenson backed up the Chrysler in the direction of two of the officers, and struck the car behind him in the drive-through lane. (J.A. 310-11). He then pulled forward and to his right, and struck an officer, who landed on the hood. (J.A. 310-11, 335-39, 349-53, 356-60). Stevenson backed up again, throwing that officer off the hood, and then drove forward in the direction of that officer and another officer. (J.A. 310-11, 335-39).

The officers fired their service pistols at the Chrysler, attempting to prevent Stevenson from hitting them again. (J.A. 310-11, 317, 325-27). Stevenson then backed the Chrysler up, spun it around completely, and drove at the officer who had been behind him. (J.A. 325-27). To protect themselves from death or serious injury, the officers repeatedly fired their service pistols

at the car, wounding Stevenson and Wallace. (J.A. 310-14, 325-27). The car stopped, and they were removed from it and placed under arrest. (J.A. 312).

Stevenson admitted that he attempted to escape in the car and maneuvered it in much the manner described by the officers. (J.A. 206-07, 228, 231). He denied that he attempted to hit, or did hit, any officer and denied that any officer was endangered. (*Id.*). He argued that the use of deadly force was not necessary to protect the officers and was not permitted to prevent his escape.

The jury decided the case in favor of the District and the officers in all respects, and it must be assumed that the jury accepted the testimony of the officers. (J.A. 439-41). Stevenson did not contest the sufficiency of the evidence to support the verdict or challenge the jury instructions in the Court of Appeals.

C. The Challenged Evidentiary Rulings.

The police recovered a loaded MAC 11 submachine gun from Stevenson's car after the shooting. It is a large weapon – about 11½ inches from the muzzle to the butt and about the same distance from the top of the gun to the bottom of the magazine. (J.A. 164). Stevenson moved *in limine* to exclude any references to the machine gun at trial. (J.A. 125). Stevenson argued that the gun had no relevance, because the police officers did not know about the gun when they attempted to arrest him and to stop his flight. He asserted that its prejudicial effect would outweigh any probative value. (*Id.*).

The District argued that the gun had probative value, because it would assist in establishing Stevenson's motive in trying to escape and would cast doubt on the credibility of his statement of his motive. (J.A. 127-28). Both Stevenson and his expert witness had attributed Stevenson's attempt to flee from McDonald's as motivated by fear of the police with their drawn weapons and his being "terrorized" by the police. (*Id.*). The

District argued that the jury could reasonably infer that Stevenson sought to escape because he knew that his parole would be revoked if he were arrested with an automatic weapon in the car. (*Id.*).

The District Court denied the motion based on its finding that "Larry Wallace's possession of a gun during the events in question is more probative than prejudicial as evidence of the plaintiff's desperation, as a convicted felon on parole who is in the presence of a firearm, to avoid arrest and his intention to use his vehicle as a weapon and is admissible in the government's case in chief." (J.A. 114).[1] The gun was admitted during the testimony of the evidence technician (an MPD officer) who investigated after the shooting and collected evidence from the scene. (J.A. 292-93).

Stevenson's tactics and testimony at trial also had a bearing on the admissibility of the gun. In her opening statement, Stevenson's counsel stated her client's testimony would be that he was terrified by his encounter with the police and that was his motive for trying to escape. She said:

> He'll tell you he was terrified. He will tell you he had no idea that the tags of the car had been called in or that the tags of the car were stolen.

---

[1] As discussed below, at trial, petitioner adopted a strategy of painting himself as a "changed man" — that he had gotten into trouble as a young man due to a drug problem he developed when a soldier in Vietnam but had turned his life around and was now a "changed man." The District Court ruled that testimony he offered to support his changed man theory opened the door to "heavy cross-examination." (J.A. 218-19). It also offers substantial support for receiving the gun into evidence. Obviously, the District Court could not have anticipated this testimony and did not rely on it for its pretrial ruling.

> He'll tell you that at that moment, he had no idea why the officers were pointing their guns at him. Robert will testify that all he could think about was that the police were trying to kill him, and all he wanted to do was to get away. [J.A. 184]

Stevenson's counsel attempted to dissociate Stevenson from the gun, stressing that the evidence would show "there was a gun found on the person of Larry Wallace who was the passenger in the vehicle" after the shooting was over. (J.A. 187) .

Stevenson's counsel stated the evidence would show that Stevenson's problems with the law resulted from a drug habit that he picked up while he was a soldier in Vietnam from 1968 to 1970 and could not shake after he returned home, but that he was now a "changed man." (J. A. 187-88). Counsel stated:

> Robert has gotten in trouble over the years over crimes stemming from his drug habit ....
>
> Today as we sit here in court, however, you will hear Robert Stevenson testify that he is a changed man. He's got a family. He's got four little boys that he loves very much. He will tell you that he's educated himself. He's got a bachelor of science degree, a bachelor of arts degree, and most recently he's applied to be a member of a writing program which he plans to attend in the future. [J.A. 188]

During his direct examination, Stevenson stated that he had grown up in Washington and had attended public schools through junior high. (J.A. 196). He said he was drafted into the Army in 1968 and served in Vietnam, where he earned a bronze star; he was honorably discharged in 1970. (J.A. 196-97). He developed a drug habit and was not able to keep a job he secured as a security guard at the General Accounting Office. (*Id.*).

He said that he developed problems with the law and ended up in prison. (J.A. 197). While in prison, he earned a GED and degrees from "Coffin" (*sic*) and Morgan State universities. (J.A. 198). He said he has three children, one age 6 and twins age 5, and that at the time of trial he was still the sole means of support for these children. (J.A. 200).

He said that, on March 7, 1996, he borrowed a car from a friend and went from Anacostia with Larry Wallace to visit friends who lived in the neighborhood near Capital Hill where he grew up. (J.A. 201-02). He first met Wallace in the early 80's, and he met him again after Stevenson was paroled in about 1994. (J.A. 202-03). Stevenson denied that he had a gun but said that Wallace had told him that he had a gun with him; it was on his person but Stevenson did not know where. (J.A. 195, 202-03). On the way back from visiting their friends to return the car, Stevenson drove into the McDonald's restaurant. (J.A. 202).

Stevenson described the encounter with the police and the shooting that occurred; he said that he tried to escape because he was scared.

> Before I can take the car out of gear or figure, I notice the police car coming towards me fast with the light, siren, what have you right towards me, fast, right to me.
>
> And stop. Right in front of me. And the officers jump out with their guns drawn; this other officer comes out of the store with his gun drawn. They hollering. All of them hollering.
>
> I'm not going to show exactly the particular words they using but they hollering at me. The guns are pointing at me.
>
> *I immediately – I'm scared.* I put the car in reverse; and when I put the car in reverse, I turn it to my right to get – to take – kick the back out, because I can't go forward

> because they're in front of me, and there's some parked cars to my – to my immediate right, so I can't go around them. The only way I can go back.

(J.A. 205-06, emphasis added). Minutes later, he repeated that he tried to flee because "I just got scared and – my initial reaction was to back the car up. I was trying to get away from them. And I didn't – I just didn't believe that they were shooting." (J.A. 209).

On cross-examination, Stevenson admitted that he was currently incarcerated as a result of a conviction of an armed robbery that he committed with Larry Wallace just two days before the incident at McDonald's restaurant on which this action is based. (J.A. 220). He said that he met Larry Wallace at the Maryland penitentiary when both were incarcerated there. (J.A. 222). Both he and Wallace were convicted of the armed robbery that they committed on March 5, 1996. (J.A. 223).

Stevenson again stated that he was scared when he was surrounded by police with their weapons drawn but he did not believe they would shoot; his initial response was to get away. (J.A. 228). However, he acknowledged that he was concerned that if he "and Mr. Wallace had to get out of that car the presence of that semiautomatic weapon, that it would result in the revocation of [his] parole." (J.A. 229).

D. The Court of Appeals' Ruling.

The Court of Appeals reviewed the District Court's evidentiary ruling for an abuse of discretion; it held that the court did not abuse its discretion in ruling that the gun was admissible and in receiving it into evidence. (App. 5a-7a). The gun was "probative of an important issue in the case, namely which version of the events — Stevenson's or the officers' — was true." (App. 7a). It was relevant because "it tends to support the proposition that Stevenson was intent on escaping at all costs and in so doing placed the officers at risk." (App. 6a). The

court also affirmed the District Court's ruling that the prejudicial effect of the gun did not outweigh its probative value. (App. 6a).

REASONS FOR DENYING THE WRIT

1. Petitioner's decision in the trial court to place in issue his motivation for flight makes this case an improper vehicle for the issue he presents. Petitioner asserts that the decision of the Court of Appeals conflicts with holdings of other courts of appeal on the admissibility of the evidence of the motives of a plaintiff alleging excessive force in overcoming his flight or other resistance to arrest. He argues that if the defendant police officers were unaware of the plaintiff's motivation at the time they used force, evidence of that motivation is inadmissible hindsight evidence.

Stevenson is the party who put the question of motivation in attempting to escape at issue in the case. Stevenson's counsel stated in her opening statement that the reason he attempted to escape was that he was terrified by the police show of force and wanted to get away due to his fear. That was Stevenson's testimony at trial. It was also the motivation that Stevenson had stated during discovery and the principal ground on which the District opposed the motion *in limine* which sought exclusion of the gun; it was also the deposition testimony of his expert. (J.A. 127-28). His trial tactic was to blame the police for his flight. His theory was that the officers' show of force compelled him to flee, and the officers then used his flight to justify the force they used.

The gun was probative in offering a far different motive in fleeing from the police. When the police encountered him, Stevenson was a felon on parole who was with another felon (Wallace) who was also on parole. They were in a stolen car and had a machine gun in their possession. They had committed an armed robbery together two days earlier for which Stevenson was convicted on a plea of guilty. Getting caught with that gun would most certainly have led, at the very least, to the

revocations of their paroles. As the District Court ruled in its April 26, 2000, Order, this evidence was probative of Stevenson's "desperation, as a convicted felon on parole who is in the presence of a firearm, to avoid arrest and his intention to use his vehicle as a weapon" and of "Larry Wallace's status as a felon and his possession of a firearm" and his "motivation to encourage the plaintiff to escape the custody of the police officers at all costs." (J.A. 114). The presence of this gun and the resulting dire consequences offered substantial support for the officers' testimony that Stevenson drove at, and hit, police officers who surrounded him in a desperate attempt to get away. That is so without regard to whether the officers knew petitioner and his partner were armed.

Having placed the question of motive in issue, petitioner is not now in a position to argue that the issue was irrelevant. He invited the alleged error he now challenges and that is an important factor militating against a grant of certiorari. *Cf. United States v. Wells*, 591 U.S. 482, 488 (1997). His trial tactics made the issue relevant even if the gun were otherwise excludable.

2. Petitioner alleges that the decision of the Court of Appeals in this case directly conflicts with the decisions of other circuits. There is no such conflict. Only two of the decisions from other circuits on which petitioner relies involves or discuss a situation like we have here where a plaintiff sought to exclude evidence in order to insulate his testimony from contradiction on matters he put in issue. Those decisions support the rulings challenged here.

Petitioner asserts that information received by an officer after-the-fact cannot provide a justification for an officer's use of force. Petitioner relies on *Graham v. Conner*, 490 U.S. 386, 397 (1989) ("The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene."); *Palmquist v. Selvik*, 111 F.3d 1332, 1341 (7th Cir.

1997) (Officers may not justify a use of deadly force on information "not within [their] personal knowledge at the time of the shooting."). He argues the gun was inadmissible under these principles. In making this argument, petitioner fails to acknowledge that the District did not seek admission of the gun to justify the shooting nor did the court below admit it for that purpose. The gun was offered and admitted because it offered strong evidentiary support for the officers' version of the facts – that appellant hit one officer and endangered others in his frantic attempt to escape their attempt to arrest him.

In addition to the testimony on his motive for escape, Stevenson and his attorneys adopted a trial strategy of attempting to paint Stevenson as being something he was not. They attempted to show that Stevenson had gotten into trouble with the law as a result of a drug problem he picked up while a soldier in Vietnam. His counsel stated that he was now a "changed man." In his testimony at trial, Stevenson omitted the fact that he was incarcerated. He stated that he was then the sole support of his three children and testified concerning his educational accomplishments during an earlier incarceration. In fact, he was not a "changed man." He had committed an armed robbery with Larry Wallace just two days prior to the incident at the McDonald's restaurant. The fact that they were together two days later in a stolen car with a machine gun in their possession gave the jury a basis to evaluate this claim of reform. This is the last day he was a free man, because he was incarcerated from that day until the day of trial. Again, appellant is the party who put this matter at issue. The gun was admissible to counter the "changed man" testimony as well as the testimony that he attempted escape because he was "terrorized" by the police.

We do not believe there is authority from other circuits to exclude this evidence under these circumstances. For example, petitioner argues that the Seventh Circuit excludes all evidence relating to whether the plaintiff was armed and of his motive to resist arrest where that information was unknown to the officer

at the time of the use of force, even when the fact of resistance is disputed. He asserts that the law of the Seventh Circuit is that "when considering a charge of excessive force, evidence outside the time frame of the shooting is irrelevant and prejudicial." *Palmquist v. Selvik*, *supra*, 111 F.3d at 1339 (citing *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988) (*en banc*).

However, in its leading case, the *en banc* decision in *Sherrod v. Berry*, the Seventh Circuit explicitly stated that its decision "should not be interpreted as establishing a black-letter rule precluding the admission of evidence which would establish whether the individual alleging a § 1983 violation was unarmed at the time of the incident." 806 F.2d at 806. The Court stated that a weapon would be admissible for precisely the reason it was allowed in evidence here by the District Court. The Court stated a gun could be introduced to challenge "the credibility of a witness" which "can always be attacked" and that "impeachment by contradiction is a technique well recognized in the federal courts by which specific errors in the witnesses's testimony are brought to the attention of the trier of fact." Id.. citing, 3 Weinstein's Evidence ¶607[04] p. 607-55 and ¶ 607[05] p. 607-76. These are the grounds on which the District Court exercised its discretion to admit the gun into evidence.

In light of *Sherrod*, petitioner's heavy reliance on decisions of the Seventh Circuit as allegedly conflicting is plainly misplaced. Similarly, the decision of the Eighth Circuit in *Cummings v. Malone*, 995 F.817 (8th Cir. 1993), does not conflict with the decision here. Instead, it supports the challenged evidentiary ruling. There, the plaintiff, a prison inmate, raped a female guard. Shortly after the guard reported the rape, the plaintiff was called into a prison investigator's office for questioning regarding the rape. He alleged that he was severely beaten by a number of prison guards and other prison officials during the questioning. Prior to trial, the District Court excluded all references to the rape allegation; to convictions for

assault and attempted rape of the female guard; and assaulting another (male) guard on the same day. 995 F.2d at 823. The District Court ruled that this evidence was not relevant to the question of whether the guards had assaulted the plaintiff and that it was unduly prejudicial. *Id.*

At trial, the plaintiff testified in his direct examination that he did not know that guards took him to the investigator's office. 995 F.2d at 824. This testimony was contrary to his deposition testimony and to the allegations in his complaint, which were that he was taken there for questioning about the rape. *Id.* He also testified that he did not assault the male guard. *Id.* However, he had been convicted of assaulting him. *Id.* The District Court refused to permit evidence countering this testimony, relying on its pretrial ruling. *Id.* at 824-25.

On appeal, the Eighth Circuit held that the District Court did not abuse its discretion when it entered the pretrial order excluding references to the rape and the convictions for assault and attempted rape. 995 F.2d at 823-24. However, it held that "the district court committed reversible error in excluding testimony about the sexual assault conviction once Cummings [the plaintiff] 'opened the door' to these issues on direct examination." *Id.* at 823. The court erred in refusing to allow the prior inconsistent statements, evidence of the conviction of assault, and specific felony convictions. *Id.* at 827.

Here, these principles of curative admissibility apply with special force. Petitioner went much further than did the plaintiff in *Cummings*. Petitioner's trial strategy was first to blame the police for his decision to attempt escape. Then he tried to convince the jury that he had gotten into trouble when he was young to support a drug habit he had acquired in Vietnam, but he is now a "changed man." The District and the officers were entitled to counter the testimony he offered to advance these strategies. The gun was important in that effort, and the District Court did not abuse its discretion in receiving it into evidence.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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